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No. 201

In the Supreme Court of the United States

OCTOBER TERM, 1950

HARRY SACHER, RICHARD GLADSTEIN, GEORGE W. CROCKETT, JR., LOUIS F. MCCABE, ABRAHAM J. ISSERMAN, AND EUGENE DENNIS, PETITIONERS

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

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OPINIONS BELOW

The majority (3R. 1-31)[1] concurring (3R. 91-111) and dissenting (3R. 111-117) opinions of the Court of Appeals (3R. 1-117) in the instant case

[1] We adhere to the mode of reference to the various volumes of the record which petitioners have adopted. Petitioners' appendix in the court below is designated "1"; our appendix is referred to as "2"; and the volume containing the opinion and orders of the court below is referred to as "3." The twenty-one volume joint appendix used on the appeal of petitioners' clients is referred to as "D.R."

are reported at 182 F. 2d 416. The certificate of contempt filed by the trial court appears as an appendix to the majority opinion (3R. 31-90) and is reported at 182 F. 2d 416, 430. The opinion of the Court of Appeals in the related appeal of petitioners' clients has not yet been reported.[2]

JURISDICTION

The judgment of the Court of Appeals was entered April 5, 1950 (3R. 118), and a petition for rehearing was denied May 15, 1950 (3R. 154). On May 23, 1950, an order was entered by Mr. Justice Jackson extending the time for filing a petition for a writ of certiorari through July 14, 1950 (3R. 155). The petition was filed July 14, 1950. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTIONS PRESENTED

1. Petitioners engaged in a long series of acts of misbehavior in open court during a nine-month trial. The trial judge made it plain to petitioners that their misbehavior was noted by the court and would be punished, but he withheld formal contempt action until the verdict was entered, because to have acted sooner, in the judgment of the trial judge, would have materially contributed to appellants' purpose to so disrupt the trial as to prevent a final determination of the issues. The principal question presented is whether the trial

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[2] We have lodged nine copies of the opinion with the Clerk of this Court.

judge's admitted power to punish summarily each act of misconduct as it occurred was lost because, in the interest of frustrating petitioners' illicit purpose, the trial judge delayed formal contempt action until entry of the verdict, but before the conclusion of the case.

2. Subsidiary questions presented are:

a. Whether the validity of the concurrent sentences for specific acts of misbehavior is impaired because the Court of Appeals reversed Specification I charging as a contempt a continuing joint effort to obstruct the trial on the ground that such an offense is not punishable summarily.

b. Whether as to the various specifications which were affirmed, the certificate adequately recites the facts in conformity with Rule 42(a), F.R. Crim. P.

STATUTORY PROVISIONS AND RULE INVOLVED

Chapter 21 of Title 18, United States Code, provides:

§ 401. *Power of Court.*

A court of the United States shall have power to punish by fine or imprisonment, at its discretion, such contempt of its authority, and none other, as—

(1) Misbehavior of any person in its presence or so near thereto as to obstruct the administration of justice;

(2) Misbehavior of any of its officers in their official transactions;

(3) Disobedience or resistance to its lawful writ, process, order, rule, decree, or command.

§ 402. *Criminal Contempts*

* * *

This section shall not be construed to relate to contempts committed in the presence of the court, or so near thereto as to obstruct the administration of justice, nor to contempts committed in disobedience of any lawful writ, process, order, rule, decree, or command entered in any suit or action brought or prosecuted in the name of, or on behalf of, the United States, but the same, and all other cases of contempt not specifically embraced in this section may be punished in conformity to the prevailing usages at law.

Rule 42, Federal Rules of Criminal Procedure, provides:

(a) *Summary Disposition.* A criminal contempt may be punished summarily if the judge certifies that he saw or heard the conduct constituting the contempt and that it was committed in the actual presence of the court. The order of contempt shall recite the facts and shall be signed by the judge and entered of record.

(b) *Disposition upon Notice and Hearing.* A criminal contempt except as provided in subdivision (a) of this rule shall be prosecuted

on notice. The notice shall state the time and place of hearing, allowing a reasonable time for the preparation of the defense, and shall state the essential facts constituting the criminal contempt charged and describe it as such. The notice shall be given orally by the judge in open court in the presence of the defendant or, on application of the United States attorney or of an attorney appointed by the court for that purpose, by an order to show cause or an order of arrest. The defendant is entitled to a trial by jury in any case in which an act of Congress so provides. He is entitled to admission to bail as provided in these rules. If the contempt charged involves disrespect to or criticism of a judge, that judge is disqualified from presiding at the trial or hearing except with the defendant's consent. Upon a verdict or finding of guilt the court shall enter an order fixing the punishment.

STATEMENT

Petitioners appeared as defense counsel in the case of *United States* v. *Dennis, et al.*, a prosecution of eleven leaders of the Communist Party for violation of the Smith Act (now 18 U.S.C. 2385). The case was called for trial on January 17, 1949, and was concluded in the trial court on October 21, 1949, approximately nine months later. Immediately after the jury returned its verdict on October 14, the trial judge filed a certificate of contempt containing forty specifications (1R. 17a-73a), and appropriate orders convicting petitioners of the various contempts specified against

each of them in the certificate.[3] The first specification was framed on the theory of a continuing joint effort by all petitioners to obstruct the trial, and all were convicted on this charge. The remaining thirty-nine specifications charged as contempts specific acts of misconduct in open court during the course of the trial, and only those petitioners who were parties to the specific misconduct charged were convicted under these specifications. Petitioner Sacher was convicted of twenty-three separate contempts and was sentenced to imprisonment for a term of six months on each contempt, the sentences to be served concurrently (1R. 16a). Petitioner Gladstein was similarly sentenced for each of eighteen contempts (1R. 13a), as was petitioner Dennis on each of five specified contempts (1R. 11a). Petitioner Crockett was sentenced to imprisonment for a term of four months on each of nine contempts, the sentences to be served concurrently (1R. 12a), as was petitioner Isserman on each of seven specified contempts (1R. 14a). Petitioner McCabe was sentenced to imprisonment for a term of thirty days on each of six specified contempts, the sentences to be served concurrently (1R. 15a).

Upon the entry of the contempt judgments, each petitioner addressed the Court protesting the judgments (1R. 86a-99a). In response to peti-

[3] The trial judge read in open court that portion of the certificate ending with specification I, and the orders which recite the specifications of which each petitioner was convicted. (R. 81a-86a).

tioner Sacher's remarks conceding "that the power rests in the Court to act summarily" but urging that as a matter of discretion petitioners should have been accorded a hearing (1R. 90a-91a), the trial judge stated (1R. 91a-92a):

> Let me say this to you, Mr. Sacher: as to these contempt adjudications, let them be notice to you and to all who may be tempted to follow your example that there is power in the judicial system of the United States under the Constitution and the laws of the United States to protect and maintain the dignity of the court and the orderly administration of justice therein.
>
> It is contemplated in the rules that the punishment should be summary. I have waited until today because it was the first time that I could act, as I have indicated in what I read to you from the certificate.

Upon appeal to the Court of Appeals, the court found the evidence not "sufficiently clear" to support Specifications XV and XVIII, which charged petitioner Sacher with deliberately attempting to deceive the court. Two of the three members of the court (Frank and Clark, J.J.) were of the view that Specification I charging a continuing joint effort to disrupt the administration of justice was not punishable summarily, and, accordingly, the conviction on that Specification was reversed. The majority of the court (A.N. Hand and Frank, J.J.) in separate opinions concluded that the evidence amply supported the convictions under the

remaining thirty-seven specifications and that the convictions were a proper exercise of the summary contempt power in conformity with Rule 42(a), Federal Rules of Criminal Procedure. Judge Clark dissented on the ground that the power to convict without a hearing for contempt in the face of the court may be exercised only at the instant of the misbehavior and only if such action is necessary to permit the further functioning of the court.

ARGUMENT

The facts, the legal issues and the related policy considerations were fully briefed by the parties in the court below and they are fully dealt with in the opinions of Judge Hand (3R. 3-31) and Judge Frank (3R. 91-111) below. In the circumstances, there is no occasion to restate here what already appears in the opinions, and we accordingly confine our argument to considerations which supplement the opinions in the court below.

1. Petitioners' effort to shift responsibility for the untoward events in the trial court by attacking the judicial probity of the trial judge has been considered by all six judges of the court below and rejected. While the bench which considered the instant case was divided on a question of procedure, there was unanimity in characterizing petitioners' conduct. Judge Clark, dissenting, referred to it as "abominable" (3R. 111). The main opinion (per A. N. Hand, J.) described petitioners' courtroom conduct as "intolerably obstructive to an orderly trial" (3R. 29), and Judge Frank

described it as "outrageous" (3R. 91). On the appeal of petitioners' clients another bench of the court (L. Hand, Swan and Chase, J.J.) also reviewed the record. That bench found that petitioners did all that they could "to make impossible an orderly and speedy dispatch of the case"; that "the record discloses a trial fought with a persistence, an ingenuity, and—we must add—with a perversity, such as we have rarely, if ever, encountered." With respect to the conduct of the trial judge, Chief Judge Hand summed up the record as follows:

> The record discloses a judge, sorely tried for many months of turmoil, constantly provoked by useless bickering, exposed to offensive slights and insults, harried with interminable repetition, who if at times he did not conduct himself with the imperturbability of a Rhadamanthus, showed considerably greater selfcontrol and forbearance than it is given to most judges to possess.

In the light of the review of the lengthy record by all six judges of the court below and their unanimous conclusion concerning petitioners' conduct, it is fanciful for them to argue now that it was the trial judge, not they, who is chargeable with misconduct.[4]

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[4] Petitioners' intimation in this Court (Pet. 7) that the trial judge falsified the facts in his certificate of contempt is starkly in contrast with their failure in the trial court even to move to modify the certificate to reflect the facts consistently with petitioners' version. As an illustration of

2. Petitioners' argument, which the dissenting judge below adopted, that the summary contempt power to punish misbehavior in the presence of the court may be exercised only to remove an impending obstruction to the further functioning of the court in the trial of the case and that it may never be exercised at the conclusion of the trial simply does not square with the decided cases. Even in *Ex parte Terry*, 128 U. S. 289, upon which Rule 42(a) is based, the obstruction to the court's business was terminated and the reading of the court's opinion was completed before steps were taken summarily to punish Terry for his contempt.[5] If the theory of petitioners and the dissenting judge were sound, this Court would have been required to grant the writ of habeas corpus to Terry on the ground that the lower court lacked power to punish him summarily for misconduct which was not a pending obstruction at the time the court acted.

We have found no decision which holds that the summary contempt power, which Congress has directed shall be exercised "in conformity

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their point, petitioners refer to Specification VII (Pet. 12) and indicate that the trial judge gave permission to petitioner Isserman to address the court. They neglect, however, to point out that after an extended colloquy, the trial judge several times indicated that he desired no further argument, and that when petitioner Isserman finally subsided, his colleagues, petitioners McCabe, Sacher and Crockett took their turns at the judge (2 D.R. 1133-1142).

[5] See the detailed facts as set forth by Judge Frank (3R. 98-99) and in the report of the case in the lower court. *In re Terry*, 36 Fed. 419, 420 (C.C.D. Calif.).

to the prevailing usages at law" (18 U.S.C. 402), may be exercised only to remove a pending obstruction to the court's functioning. To the contrary, both the Federal and State courts have been unanimous in adopting the view which the court below adopted.[6] It is true that the *Terry* decision left open the question whether the summary contempt procedure could be followed "at a subsequent term, or at a subsequent day of the same term" (128 U. S. at 314). But the Court was not referring to the situation of a continuing trial, as was the case here. There, the proceeding had been completed and the reservation related to acting on a day or term subsequent to the termination of the proceeding.

The situation here is not one where the attorneys had no occasion to believe during the course of trial that their conduct was improper and then were later taken by surprise. Here, as the court's opinion emphasizes with record references (3R. 26), the trial judge made it plain to petitioners that their conduct was not acceptable and would be dealt with at the earliest possible moment. And this was done. In the opinions below, both Judges A. N. Hand and Frank agree that this was a satisfactory procedure in the context of petitioners'

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[6] In addition to the decisions cited in the court's opinion (3R. 29), see *Hallinan* v. *United States*, 182 F. 2d 880, 887 (C.A. 9); *O'Malley* v. *United States*, 128 F. 2d 676, 684 (C.A. 8), reversed on another ground, *sub nom. Pendergast* v. *United States*, 317 U. S. 412; *In re Grossman*, 109 Cal. App. 625, 631-632, 293 Pac. 683, 685-686.

deliberate effort to break up the trial. Their view is supported by Judges Learned Hand, Swan and Chase. In the opinion on the appeal of petitioners' clients, the latter bench stated:

> * * * at times he [the trial judge] warned them [petitioners] that if they persisted in conducting themselves as they had been doing, he would punish them when the trial was over. (An entirely proper action, for to commit them pending the trial would have broken it up, and to be silent might well have misled them.)

The short of the matter is that the trial judge had the power to impose summary punishment for each act of misbehavior as it occurred. He did not do so because that course of action would have permitted petitioners and their clients to achieve their objective and cause a mistrial. Instead he adopted a course which was calculated to prevent demoralization of the court's authority before the public and yet protect the trial from disruption. As five judges of the court below have concluded, that was a sensible resolution of a difficult problem, and it was one which did not in the least prejudice petitioners.

3. We submit that there is no substance to petitioners' argument (Pet. 23-26) that the reversal of Specification I, which charged a joint continuing contempt throughout the trial requires the reversal of the other specifications which charged specific acts of contempt against the various peti-

tioners. In this respect the certificate is akin to an indictment which charges a conspiracy in the first count and substantive offenses in the remaining counts. It has never been thought that the failure of the prosecution under the conspiracy charge in any manner affects the remaining counts. *Long* v. *United States*, 139 F. 2d 652, 653-654 (C.A. 10).

Perhaps in anticipation of the argument which petitioners advance, the trial judge made it abundantly clear that he intended each specification to be viewed as a separate offense. For he imposed a separate sentence for each specification and directed that they be served concurrently. In these circumstances, there is no basis for reversal on appeal unless all the sentences are invalid. *Pinkerton* v. *United States*, 328 U. S. 640, 641-642; *Hirabayashi* v. *United States*, 320 U. S. 81, 85.

4. Petitioners' final argument (Pet. 26-27) that the Certificate is inadequate because it does not recite the facts as Rule 42(a) requires is absurd. Each of the thirty-seven specifications which were affirmed carefully sets forth the precise facts upon which the contempt order is based. In testing the quality of petitioners' conduct, the court below had no difficulty in ascertaining the facts from the specifications in question. It certainly did not prejudice petitioners that the trial judge sought also to incorporate the entire trial record into the certificate. Whether or not it was incorporated into the certificate, the trial record would have been

before the court below and this Court. Indeed, we do not understand petitioners to urge that in assessing their conduct the appellate courts may not examine the specifications in question in the context of the entire trial record.

CONCLUSION

The extensive record is permeated with illustrations of petitioners' desperate efforts to break up the trial. In dealing with that conduct the trial judge adopted a course which was consistent with Rule 42, the decided cases and considerations of public justice. To deny a trial court sufficient flexibility of power to protect the administration of justice from petitioners' odious conduct would be to place the court at the mercy of those who respect "neither the laws enacted for the vindication of public and private rights nor the officers charged with the duty of administering them" (*Ex parte Terry*, 128 U. S. 289, 313). We respectfully submit that the petition for a writ of certiorari should be denied.

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AUGUST 1950.

☆ U. S. GOVERNMENT PRINTING OFFICE: 1950 902663 103